UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID R. GELINAS, et al.,

Plaintiffs,

v.

U.S. BANK, NA, et al.,

Defendants.

CASE NO. 16-1468JLR

ORDER GRANTING MOTIONS TO DISMISS

I. INTRODUCTION

Before the court are Defendants U.S. Bank Trust, NA[1] ("U.S. Bank") and Caliber Home Loans, Inc.'s ("Caliber Home") motion to dismiss (1st Mot. (Dkt. # 8)) and Quality Loan Service Corporation of Washington's ("Quality Loan") motion to dismiss (2d Mot. (Dkt. # 10)) Plaintiffs David and Karen Gelinas's complaint (Compl. (Dkt.

[1] The complaint names "U.S. Bank, NA, as Trustee for LSF9 Master Participation Trust" as a defendant. (Compl. (Dkt. # 1) ¶ 2.) However, Defendant U.S. Bank responds that the proper entity is "U.S. Bank Trust, N.A." (Corp. Discl. Statement (Dkt # 7) at 1.) Accordingly, the court uses "U.S. Bank Trust, N.A."

1)). The court has considered the motions, the submissions filed in support thereof and opposition thereto, the relevant portions of the record, and the applicable law. Being fully advised,[2] the court GRANTS U.S. Bank and Caliber Home's motion and GRANTS Quality Loan's motion for the reasons set forth below.

II. BACKGROUND

This case arises out of a planned non-judicial foreclosure—a trustee's sale—of the Gelinases' home and Mr. Gelinas's resulting bankruptcy filing. (Req. (Dkt. # 9) at 2, Ex. F at 2; Compl. ¶¶ 18, 21.) On September 21, 2006, the Gelinases signed a deed of trust[3] for $368,000.00 with Washington Mutual Bank, which was recorded against the Gelinases' residence in Marysville, Washington. (Compl. ¶¶ 13, 15; *see also* Req. at 2, Ex. A, at 3.) In the three-way deed of trust transaction, the Gelinases were the borrowers, Washington Mutual Bank was the lender, and Rainier Title was the trustee at the time the parties signed the deed of trust. (Compl. ¶¶ 15, 28.) The balance of the Gelinases' allegations focus on the multiple assignments and transfers of the deed of trust prior to the foreclosure.

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[2] No party has requested oral argument, and the court deems it unnecessary to the disposition of this motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

[3] A deed of trust is a three-party transaction in which a borrower conveys title to his or her property to a trustee, who holds the title in trust for the lending party, who is the deed of trust beneficiary. *Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34, 38 (Wash. 2012). The deed of trust grants the beneficiary a power of foreclosure that the beneficiary can invoke if the borrower defaults on the loan. *Id.* (citing RCW 61.24.020; RCW 61.12.090; RCW 7.28.230(1)). The Washington Deed of Trust Act empowers the trustee to sell the property at a trustee's sale. *Id.*; RCW 61.24.020.

Although the Gelinases' complaint is not a model of clarity, the court summarizes the Gelinases' allegations as follows.[4] The Gelinases allege that various banks assigned the deed of trust multiple times after its initial recording. (*Id.* ¶¶ 28-29, 31-34.) First, on August 1, 2008, Deutsche Bank National Trust Company ("Deutsche Bank") recorded an assignment of the deed of trust from Washington Mutual Bank. (*Id.* ¶ 29.) Nearly five years later, on April 4, 2013, JPMorgan Chase Bank ("JPMorgan") recorded an assignment of the deed of trust from Deutsche Bank. (Compl. ¶ 33 (noting that the year is mistakenly listed as 2014 and that exhibit D states the correct date); *see id.* ¶ 33, Ex. D at 2.) JPMorgan then assigned the deed of trust to U.S. Bank and recorded the assignment on August 3, 2015. (*Id.* ¶ 34.)

In addition to the multiple assignments of the deed, the Gelinases allege that the trustee of the deed also transferred multiple times. (*Id.* ¶¶ 28-31.) Before Deutsche Bank recorded itself as the beneficiary of the deed of trust,[5] the bank recorded a substitution of the trustee under the deed of trust by appointing Quality Loan as substitute trustee on July 18, 2008. (*Id.* ¶ 28.) On November 16, 2009, JPMorgan recorded J.P. Morgan Chase Custody Services as trustee under the deed of trust. (*Id.* ¶ 32, Ex. C at 2.) On April 24, 2013, JPMorgan appointed Quality Loan as the new trustee under the deed of trust. (Req. at 2, Ex. E, at 34.)

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[4] "Pro se pleadings are liberally construed . . . ." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

[5] Washington Mutual assigned Deutsche Bank as beneficiary of the deed of trust, and recorded the assignment on August 1, 2008. (Compl. ¶ 29.)

In May, 2016, Quality Loan—the recorded trustee at that time—notified the Gelinases of the pending trustee's sale. (*Id.*, Ex. F at 37.) On August 12, 2016, Mr. Gelinas filed for bankruptcy, and on August 29, 2016, Mr. Gelinas amended his bankruptcy filing. (Compl. ¶ 18; Req. at 2, Ex. A, at 1.)

On September 16, 2016, the Gelinases filed this *pro se* lawsuit against U.S. Bank, Quality Loan, JPMorgan, Long Beach Mortgage Loan Trust 2006-10, Deutsche Bank, Caliber Home, and Does 1-10. In their complaint, the Gelinases assert a claim to quiet title to the subject property. (Compl. ¶ 20.) They allege that there is no evidence that JPMorgan could have a valid "security interest in the Note." (*Id.* ¶ 20.) Based on this absence of "evidence," the Gelinases assert that the assignment to JPMorgan is invalid, and as a result "there have been multiplicities of invalid, illegitimate[,] and unauthorized recordings in the Snohomish Country [sic] Recorders' Office, all of which must be rescinded." (*Id.* ¶ 21.) The Gelinases also allege that these "illegitimate . . . recordings" constitute slander of title, and they request special damages of $100,000.00. (*Id.* ¶¶ 26, 36.) Finally, the Gelinases allege that Quality Loan is not authorized to collect payments from them or to threaten to foreclose on their property and that Quality Loan's attempts to do so violate 15 U.S.C. § 1692e(5).[6] (*Id.* ¶¶ 23-24.)

The Gelinases also seek declaratory relief in the form of "a judicial determination of the rights, obligations, and interests of the parties with regard to the Property." (*Id.*

[6] The Gelinases allege that Quality Loan violated "FDCPA 15 U.S.C. § 1692e 807(5)." (Compl. ¶ 24.) Since Section 807 was re-codified as Section 1692e in 1996, the statute in question appears to be Section 1692e. *See* Omnibus Consolidated Appropriations Act, 1997 Pub. L. No. 104-208, § 2305, 110 Stat 3009 (1996).

¶ 38.) Specifically, the Gelinases ask for a determination that U.S. Bank is not the beneficiary under the deed of trust. (*Id.* ¶ 39.) Furthermore, the Gelinases request that "all scheduled foreclosure proceedings be vacated," and that U.S. Bank "be forever estopped from foreclosing on the subject property." (*Id.* ¶ 40.)

III. ANALYSIS

U.S. Bank, Caliber Home, and Quality Loan move for dismissal under Federal Rule of Civil Procedure 12(b)(6). (1st Mot. at 1; 2d Mot. at 1.) Because U.S. Bank and Caliber Home's motion relies, in part, on documents for which they request judicial notice, the court begins by addressing the parties' requests for judicial notice. The court then addresses the motions to dismiss and whether leave to amend is appropriate.

A. Judicial Notice

Because the motions to dismiss rely on certain documents, the court first addresses U.S. Bank and Caliber Home's and the Gelinases' requests for judicial notice. (Req.; Obj. (Dkt. # 12).) U.S. Bank and Caliber Home request that the court notice the recording of the deed of trust of the subject property (Req. at 2, Ex. A), three sequential recordings of the assignment of the deed of trust (*id.*, Exs. B, C, D), a recorded notice of successor trustee (*id.*, Ex. E), a recorded notice of trustee sale (*id.*, Ex. F), and Mr. Gelinas's amended petition for bankruptcy (*id.*, Ex. G).

The Gelinases oppose all of these requests. (*See generally* Obj.) In their opposition, the Gelinases assert that "[t]here are a multiplicity of problems/errors on the documents recorded in the Snohomish County Registry." (*Id.* at 2.) The Gelinases further argue that the documents in question are in dispute and thus cannot be judicially

noticed. (*Id.*) The Gelinases also oppose the court taking judicial notice of the bankruptcy petition, but offer only the assertion that "Plaintiffs[']s schedules have been amended again." (*Id.* at 3.) U.S. Bank and Caliber Home reply that the Gelinases object only to the "validity of the documents, not the content therein." (Not. Reply (Dkt. # 14) at 2.) Furthermore, U.S. Bank and Caliber Home assert that the documents are all incorporated by reference into the complaint (*id.* (citing *U.S. v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003))), and that a court can take judicial notice of a public record that contains contested facts, provided that the authenticity of the document is not subject to reasonable dispute (*id.* at 2-3).

In their response to U.S. Bank and Caliber Home's request, the Gelinases also request judicial notice of a document that appears to be a title search by a company called Certified Loan Auditors.[7] (Obj. at 5-8.) U.S. Bank and Caliber Home oppose this request, arguing that the document is not a public record and that the court should not consider it in ruling on their motion to dismiss. (Not. Reply at 4-5.)

"The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The court can take judicial notice of public records that are not "subject to reasonable dispute." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (citing *Lee*

[7] The Gelinases' complaint also contains a request for judicial notice. (Compl. at 26.) The Gelinases request that the court take notice of a number of Supreme Court and federal Circuit Court decisions regarding treatment of *pro se* litigants. (*Id.*) The court duly notes and applies the standard by which it must assess *pro se* pleadings. *See Balistreri*, 901 F.2d at 699; *see also supra* n.4.

v. City of L.A., 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F. 3d 1119, 1125 (9th Cir. 2002)). Indeed, a court may take judicial notice of a public record when its authenticity is unchallenged, even if a party contests the assertions contained within the document. *See Palmason v. Weyerhaeuser*, No. C11-0695RSL, 2013 WL 1788002, at *2-3 (W.D. Wash. Apr. 26, 2013) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 127 (9th Cir. 2002)). Courts may also take judicial notice of court filings because their contents cannot be reasonably disputed. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

In this case, the court takes judicial notice of the recorded documents that U.S. Bank and Caliber Home present to the court. (*See* Req. at 2.) U.S. Bank and Caliber Home attest that these documents are authentic copies of Snohomish County public records. (Not. Reply at 3.) Although the "factual statements and opinions contained therein have not been conclusively established," these documents are authentic documents recorded with a governmental agency. *See Palmason*, 2013 WL 1788002, at *3.[8] The court also takes judicial notice of Mr. Gelinas's bankruptcy petition. (*See* Req. at 2, Ex. G at 2.)

[8] Additionally, these records are incorporated by reference into the Gelinases' complaint. (*See* Compl. ¶¶ 21, 31, 35.) A document is "incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 908. In this case, the recording documents for the property form the basis for the Gelinases' assertions that Defendants "illegitimate[ly]" recorded the deed of trust assignments. (Compl. ¶¶ 21, 31, 35.)

However, the court denies the Gelinases' request for judicial notice of the title search document. Although this document references public records, the document appears to be the product of a private company that conducted a title search for the Gelinases. (*See* Obj. at 5-8.) Accordingly, the document is not a public record, and it cannot be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

The court now addresses the motions to dismiss the Gelinases' complaint. (*See* 1st Mot.; 2d Mot.)

B. Motions to Dismiss

1. Legal Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded allegations of material fact as true and draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

The court, however, need not accept as true a legal conclusion presented as a factual allegation. *Id.* Although Federal Rule of Civil Procedure 8 does not require "detailed factual allegations," it demands more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*, 550 U.S. at 555). A pleading that offers only "labels and conclusions or a formulaic recitation of the elements of a cause of action" will not survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.* A complaint does not survive dismissal where "it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). In addition, "[a] plaintiff suing multiple defendants 'must allege the basis of his claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2), which requires a short and plain statement of the claim to put defendants on sufficient notice of the allegations against them.'" *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014) (quoting *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988)). In deciding a motion to dismiss, the court may consider the pleadings, documents attached to the pleadings, documents that are judicially noticed, and documents that the pleadings incorporate by reference. *Ritchie*, 342 F.3d at 908 (citing *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002)).

2. U.S. Bank and Caliber Home's Motion to Dismiss

a. Judicial Estoppel

U.S. Bank and Caliber Home first argue that all of the Gelinases' claims are barred by the doctrine of judicial estoppel. (1st Mot. at 5-6.) Relying on Mr. Gelinas's bankruptcy petition, U.S. Bank and Caliber Home assert that Mr. Gelinas did not list the

claims he asserts in this action in his bankruptcy petition. (*Id.* at 6.) They argue that the failure to list the claims means that the Gelinases have taken a position in this litigation that is inconsistent with their position in the bankruptcy action. (*Id.*) U.S. and Caliber Home further contend that the Gelinases' inconsistent positions have "misled the bankruptcy court about their assets" and "misused judicial resources." (*Id.*) The Gelinases respond to this argument only by noting that Mr. Gelinas filed an amended bankruptcy petition. (Obj. at 3 (noting the updated bankruptcy petition); *see generally* Resp. (Dkt. # 11) (containing no response to the argument).)

"'Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.'" *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1044-45 (9th Cir. 2016) (quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001)). Three factors may guide a court's decision whether to apply the doctrine: (1) whether a party's later position is clearly inconsistent with a previous position; (2) whether the party persuaded the prior court to accept the earlier inconsistent position; and (3) whether the inconsistency gave the litigant an unfair advantage in the subsequent suit. *Hamilton*, 270 F.3d at 782 (citing *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001)). However, "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations." *New Hampshire*, 532 U.S. at 750–51 (2001) (internal quotation marks omitted). When there is no such risk, courts often decline to find that judicial estoppel bars a claim. *See Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 272 (9th Cir.

2013) (quoting *New Hampshire*, 532 U.S. at 753)). That is in part because judicial estoppel "is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when . . . there is no evidence of intent to manipulate or mislead the courts." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996).

In the bankruptcy context, the Ninth Circuit has established a "basic default rule" regarding judicial estoppel: "If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin*, 733 F.3d at 271. However, "dismissal of [a p]laintiff's bankruptcy case alone, without any showing that the bankruptcy court relied on [the p]laintiff's incomplete schedules, is insufficient." *Boatright v. Aurora Loan Servs.*, No. C-12-00009 EDL, 2012 WL 2792415, at *3 (N.D. Cal. July 9, 2012); *see also Evans v. Potter*, No. 1:08-CV-1687-TWT, 2009 WL 529599, at *3 (N.D. Ga. Feb. 27, 2009). "After an order of dismissal, the debtor's debts and property are subject to the general laws, unaffected by bankruptcy concepts." *In re Income Prop. Builders, Inc.*, 699 F.2d 963, 965 (9th Cir. 1982). Accordingly, a debtor does not necessarily benefit from the prior inconsistent position where a bankruptcy court dismisses his petition without discharging or reorganizing the debt.

In Mr. Gelinas's August 29, 2016, amended bankruptcy petition, Mr. Gelinas failed to list as potential assets the claims he asserts here. (*See* Req. at 2, Ex. G at 10.) By bringing this suit, Mr. Gelinas has taken clearly inconsistent positions, which could have given Mr. Gelinas an advantage in the bankruptcy matter. In short, Mr. Gelinas's

failure to list these claims creates the appearance that he has fewer assets than he might actually have.

However, on November 9, 2016, the bankruptcy court dismissed Mr. Gelinas's bankruptcy petition. *In re Gelinas*, No. 16-14167MLB, Dkt. ## 39, 40 (Bankr. W.D. Wash. Nov. 9, 2016). There is no indication that the bankruptcy court "certif[ied] or confirm[ed] a bankruptcy plan," or that "the bankruptcy court made any orders at all regarding [Mr. Gelinas's] schedules." *See Boatright*, 2012 WL 2792415, at *3. Therefore, on the facts before the court, it does not appear that Mr. Gelinas's prior inconsistent position benefited him—a key factor in determining whether to apply judicial estoppel.

The court's conclusion is bolstered by the cases that U.S. Bank and Caliber Home cite in support of their motion to dismiss. In those cases, the debtor had utilized the prior inconsistent position to the debtor's benefit—the debtor's debts had been discharged in bankruptcy. *See, e.g.*, *Haag v. PNC Bank NA*, No. C13-1746JLR, 2014 WL 1725801, at *3 (W.D. Wash. Apr. 30, 2014) (noting that the plaintiff failed to list potential foreclosure-related claims in a bankruptcy petition and tried to bring those claims after bankruptcy); *Janaszak v. Wells Fargo Bank NA*, No. C12-5427BHS, 2012 WL 4514460, at *2 (W.D. Wash. Oct. 1, 2012) (noting that the plaintiff's debts were discharged via bankruptcy before the plaintiff brought suit); *Hernandez v. Response Mortg. Serv., Inc.*, No. 11-05685RBL, 2011 WL 6884794, at *3 (W.D. Wash. Dec. 29, 2011) (noting that the plaintiff had already completed bankruptcy before bringing suit). In light of this case

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law and the fact that the Gelinases are proceeding *pro se* in this matter, the court finds that judicial estoppel does not bar this action on the facts currently before the court.[9]

b. Quiet Title

U.S. Bank and Caliber Home next argue that the Gelinases' failure to fulfill the deed of trust obligations precludes a quiet title action.[10] (1st Mot. at 7) They also argue that the Gelinases lack standing to challenge an assignment of the deed of trust or the appointment of a successor trustee because as the borrowers, the Gelinases are "neither a party to nor an intended beneficiary of the challenged agreements." (*Id.*) In response, the Gelinases assert that "to quiet title to a property you need to eliminate the lien of mortgage. Not pay a non-existent debt." (Resp. at 4 (emphasis omitted).)

A quiet title action is an "equitable proceeding to resolve competing claims of ownership." *Washington Fed. v. Azure Chelan LLC*, 382 P.3d 20, 26 (Wash. Ct. App. 2016). Washington law provides that "[t]he plaintiff . . . shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail." RCW 7.28.120. In order to adequately allege a quiet title action, a plaintiff must allege that she has satisfied the deed of trust obligations. *See Hummel v. Nw. Tr. Serv.*, 180 F. Supp. 3d 798, 809 (W.D. Wash. 2016); *Evans v. BAC*

[9] Because the parties have not raised the issue, the court does not address whether Mr. Gelinas's prior inconsistent position in a bankruptcy action in which he was the sole debtor would bar Ms. Gelinas's claims.

[10] The Gelinases allege this claim only against JPMorgan; however, quieting title to the subject property would affect the property interests of other parties to this action, which is presumably why both U.S. Bank and Caliber Home move to dismiss the Gelinases' quiet title action. (Compl. at 6; 1st Mot. at 7-8.)

Home Loans Servicing LP, No. C10-0656RSM, 2010 WL 5138394, at *4 (W.D. Wash. Dec. 10, 2010). To satisfy the deed of trust obligations, the plaintiff must have repaid the loan. *Hummel*, 180 F. Supp. 3d at 809.

The Gelinases make no allegations in their complaint regarding the repayment of the deed of trust and respond to U.S. Bank and Caliber Home's motion with only conclusory arguments. (*See generally* Compl.; Resp. at 4.) Construing the facts in the light most favorable to the Gelinases, the Gelinases appear to allege that because the recordings are "fraudulent," they do not have to satisfy the loan obligations. (*See generally* Compl.; Resp. at 4.) However, the Gelinases' position does not accurately reflect the law. *Hummel*, 180 F. Supp. 3d at 809. Indeed, as in *Hummel*, the Gelinases "conspicuously avoid[] discussing or disputing [their] default" on repayment of the loan. 180 F. Supp. 3d at 809. By failing to allege that they repaid the debt, the Gelinases fail to adequately allege a quiet title claim.

In addition to failing to allege that they repaid the debt, the Gelinases fail to include facts sufficient to show they have standing to challenge any assignments of the deed. "[A] borrower generally lacks standing to challenge the assignment of its loan documents unless the borrower shows that it is at a genuine risk of paying the same debt twice." *Hummel*, 180 F. Supp. 3d at 806 (quoting *Andrews v. Countrywide Bank, NA*, 95 F. Supp. 3d 1298, 1302 (W.D. Wash. 2015)). The Gelinases do not allege facts from which the court can reasonably infer that they will have to pay the debt twice, and the Gelinases make no argument on this point in their response. (*See generally* Compl.; Resp. at 11.) Thus, they lack standing to challenge the assignments as a basis for their

quiet title claim.

For these reasons, the Gelinases fail to state a quiet title claim.

c. Slander of Title

U.S. Bank and Caliber Home also move to dismiss the slander of title claim against them. (1st Mot. at 10.) Specifically, they argue that the Gelinases do not allege any facts supporting malicious publication. (*Id.*) Further, U.S. Bank and Caliber Home argue that "to the extent Plaintiffs' claim is based on challenging prior Notices of Trustee's Sale that may have been recorded . . . the claim became moot once those foreclosures were discontinued." (*Id.*)

The Gelinases respond that the "[d]efendants recorded fraudulent documents in the Snohomish County Recorder's office." (Resp. at 11.) The Gelinases "consider these documents to be invalid" and assert that the assignments "must be removed from the County Records' Register." (*Id.*)

In Washington, a plaintiff must allege the following elements to state a claim for slander of title: "(1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss." *Certification from the U.S. Court of Appeals for the Ninth Circuit in Centurion Prop. III, LLC v. Chicago Title Ins. Co.*, 375 P.3d 651, 662 (Wash. 2016) (citing *Rorvig v. Douglas*, 873 P.2d 492, 496 (Wash. 1994)). "Malice is not present where the allegedly slanderous statements were made in good faith and were prompted by a reasonable belief in their veracity." *Hummel*, 180 F. Supp. 3d at 809 (quoting *Brown v. Safeway Stores, Inc.*, 617 P.2d 704, 713 (1980)); *see also Rorvig*, 873

P.2d at 496. Specifically, "the initiation of foreclosure proceedings cannot form the basis of a slander of title claim" because it does not constitute malicious publication. *Beaton v. JPMorgan Chase Bank, N.A.*, No. C11-0872RAJ, 2012 WL 909768, at *3 n.5 (W.D. Wash Mar. 15, 2012) (citing *Krienke v. Chase Home Fin., LLC*, No. 35098-0-II, 2007 WL 2713737, at *6 (Wash. Ct. App. Sept. 18, 2007)).

Here, the Gelinases make only conclusory allegations of Defendants' bad faith or actions, none of which reasonably support an inference of malice. (*See, e.g.*, Compl. ¶ 26 ("The recordation of said documents clearly constitute[s] a Slander of Title!").) In addition, most of the Gelinases' allegations stem from the foreclosure proceeding, and the initiation of a foreclosure proceeding alone cannot constitute malice. *See Beaton*, 2012 WL 909768, at *3 n.5. For these reasons, the court dismisses the Gelinases' slander of title claim.[11]

d. Declaratory Judgment

Finally, U.S. Bank and Caliber Home argue that the Gelinases' allegations regarding declaratory judgment merely reiterate their "challenge to any of the defendant's standing to foreclose," and for this reason, they argue that the Gelinases' declaratory judgment claim "fail[s] as a matter of law." (1st Mot. at 10.) The Gelinases do not respond to this argument. (Resp. at 5.)

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[11] The court declines to address the remaining elements of the slander of title claim and U.S. Bank and Caliber Home's arguments because the Gelinases fail to make sufficient factual allegations of malicious publication—a key element of their claim.

The court agrees with U.S. Bank and Caliber Home. The declaratory judgment section of the Gelinases' complaint merely recites assertions made earlier in the complaint without making any additional allegations.[12] (Compl. ¶¶ 37-21); *see also* 28 U.S.C § 2201. Thus, the Gelinases effectively re-assert the same facts for their "declaratory judgment" claim as for their other claims. (*Compare id.* ¶¶ 19-21; *with id.*, ¶¶ 37-41.) Because the court has already concluded that the Gelinases do not allege sufficient facts to state a quiet title or slander of title claim, the court dismisses the Gelinases' claim for declaratory judgment.[13]

3. Quality Loan's Motion to Dismiss

a. Violation of the Fair Debt Collection Practices Act ("the FDCPA")

Quality Loan also moves to dismiss the Gelinases' claim against Quality Loan. (*See* 2d Mot.) Quality Loan argues that it is not a "debt collector" under the FDCPA, and therefore 15 U.S.C. § 1692e(5)'s prohibitions against false or misleading representations do not apply. (2d Mot. (Dkt. # 10) at 2-3.) Additionally, Quality Loan argues that even if it were a debt collector within the meaning of the FDCPA, the Gelinases fail to allege "a deceptive act or misleading representation"—a statutory requirement for bringing a

[12] The Gelinases do not cite a statute in the portion of their complaint where they request declaratory judgment, and it is unclear whether they bring their claim under the state or federal declaratory judgment statute. (*See generally* Compl. ¶¶ 37-41.) Given the similarity of the statutes, the court analyzes the claim as though the Gelinases intended to invoke the federal statute. *See* 28 U.S.C § 2201. However, under the Washington State Uniform Declaratory Judgment Act, this claim fails for similar reasons. *See* RCW 7.24.010.

[13] The declaratory judgment section of the complaint may also contain a request for a permanent injunction against U.S. Bank. (*See* Compl. ¶ 40.) The Gelinases request that "any and all scheduled foreclosure proceedings be vacated; and the Defendant be forever stopped from foreclosing on the subject property." (*Id.*) However, the court declines to issue injunctive relief where the Gelinases' underlying claims fail.

claim under the FDCPA. (*Id.* at 3-4.) The Gelinases have not responded to Quality Loan's motion. (*See generally* Dkt.)

Section 1692e(5) provides that a "debt collector" may not "threat[en] to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5). Thus, only a "debt collector" as defined under the FDCPA can violate 15 U.S.C. § 1692e(5). *See* 15 U.S.C. 1692a(6); *Cameron v. Acceptance Capital Mort. Corp*, No. C13-0707RSM, 2013 WL 5664706, at *4 (W.D. Wash. Oct 16, 2013); *Fagerlie v. HSBS Bank, NA*, No. C12-2205RSM, 2013 WL 1914395, at *5 (W.D. Wash. May 8, 2013); *Fong v. Prof'l Foreclosure Corp.*, No. C05-0123JLR, 2005 WL 3134059, at *2 (W.D. Wash. Nov. 22, 2005). The FDCPA defines a "debt collector" as:

> Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). However, the definition of a debt collector "does not include . . . any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." *Id.* For this reason, judges in the Western District of Washington have consistently concluded that a non-judicial foreclosure action by a trustee does not generally constitute debt collection under the FDCPA. *See Fagerlie*, 2013 WL 1914395, at *5; *Thepvongsa v. Reg'l Tr. Servs. Corp.*, No. C10-1045RSL, 2011 WL 307364, at *8 (W.D. Wash. Jan. 26, 2011); *Fong*, 2005 WL

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3134059, at *2 ("A trustee . . . who commences foreclosure on a property pursuant to a deed of trust is not a debt collector as broadly defined by the FDCPA.").

The Gelinases' complaint contains no allegations that the debt at issue was not in default when Quality Loan became the trustee under the deed of trust and initiated the non-judicial foreclosure proceeding. (*See generally* Compl.) Viewing the complaint in the light most favorable to the non-moving party, the Gelinases may be attempting to assert that deficiencies in the chain of title led Quality Loan to "threaten" to foreclose on the Gelinases' property when Quality Loan allegedly had no legal right to do so. (Compl. ¶¶ 21-23.) Even after making this inference in the Gelinases' favor, however, the Gelinases fail to state an FDCPA claim against Quality Loan because there are no allegations that the loan was not in default. Thus, the court grants Quality Loan's motion to dismiss.

4. Leave to Amend

Having concluded that the Gelinases fail to state a claim against U.S. Bank, Caliber Home, and Quality Loan, the court now considers whether it should grant the Gelinases leave to amend. (Resp. at 3.) The Gelinases seek leave to amend "to include new causes of action." (*Id.*) U.S. Bank and Caliber Home oppose granting leave to amend because the "[c]omplaint offers no suggestion that the defects may be cured by an amended pleading." (1st Mot. at 10.) They further argue that the Gelinases offer only vague promises of new claims, without showing how these claims will survive dismissal due to the Gelinases' failure to repay their loan. (Reply (Dkt. # 13) at 4.) Quality Loan does not address amendment. (*See* 2d Mot.)

Federal Rule of Civil Procedure 15 states that "the court should freely give leave [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2). In order to determine whether justice requires leave to amend, the court considers: (1) the presence or absence of undue delay, (2) bad faith, (3) dilatory motive, (4) "repeated failure to cure deficiencies" in previous amendments, and (5) futility of the amendment. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*, 371 U.S. 178, 181, 83 (1962)). "Unless it is absolutely clear that no amendment can cure the defect, . . . a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (quoting *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam)).

Given Rule 15's favorable pleading standard, the court grants the Gelinases leave to amend their complaint. At this stage, the court cannot conclude that the Gelinases cannot possibly remedy their complaint to state a claim. Nor is there any indication of undue delay, bad faith, or dilatory motive, and the Gelinases have not previously amended their complaint. Accordingly, the Gelinases' must file an amended complaint, if any, no later than 20 days of the date from this order. Failure to file an amended complaint within this timeframe may result in the court dismissing the Gelinases' claims against U.S. Bank, Caliber Home, and Quality Loan.

C. Service of Process on the Remaining Defendants

Although the parties do not raise the issue, the court notes that it does not appear that the other defendants in this action have been served. (*See generally* Dkt.) Federal

Rule of Civil Procedure 4 requires plaintiffs to serve defendants with a summons and a copy of the plaintiff's complaint and sets forth the specific requirements for doing so. *See* Fed. R. Civ. P. 4. Rule 4(m), which provides the timeframe in which service must be effectuated, states in relevant part:

> If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

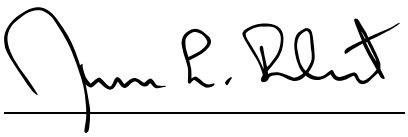
Fed. R. Civ. P. 4(m); *see also* Fed. R. Civ. P. 4(l) (stating requirement of proving service). The Gelinases filed their complaint on September 16, 2016. (Compl. at 1.) However, there is no evidence in the record that the Gelinases properly served Deutsche Bank, Long Beach Mortgage Loan Trust 2006-10, or JPMorgan ("the Remaining Defendants") with the summons and complaint within the time period that Rule 4(m) provides. (*See generally* Dkt.) Therefore, the Gelinases must show cause within 20 days of this order why their claims against the Remaining Defendants should not be dismissed for failure to comply with Rule 4(m). The Gelinases' response to the court's order to show cause should be filed separately from any amended complaint. If the Gelinases fail to show good cause for their failure to serve these defendants, the court will dismiss the claims against the Remaining Defendants without prejudice pursuant to Rule 4(m).

IV. CONCLUSION

For the reasons set forth in this order, the court GRANTS U.S. Bank and Caliber Home's motion to dismiss (Dkt. # 8) and GRANTS Quality Loan's motion to dismiss (Dkt. # 10). The court also GRANTS the Gelinases leave to amend their complaint. The

Gelinases must file their amended complaint, if any, no later than twenty (20) days of the date of this order. The court further ORDERS the Gelinases to SHOW CAUSE within twenty (20) days of the date of this order why their claims against JPMorgan, Long Beach Mortgage Loan Trust 2006-10, Deutsche Bank, and Does 1-10 should not be dismissed. Any amended complaint and response to the court's order to show cause must be filed separately.

Dated this 10th day of February, 2017.



JAMES L. ROBART
United States District Judge